1996

State of Utah v. Kenneth D. Souza : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	
	BRIEF OF APPELLANT
Plaintiff/Appellee	
vs.	
	Case no. 960149 CA
KENNETH D. SOUZA,	priority no. 2
Defendant/Appellant.	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for: Count I: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a second degree felony; Count II: TAMPERING WITH EVIDENCE, a second degree felony; Count III: FAILURE TO PAY DRUG STAMP TAX, a third degree felony; COUNT IV: FAILURE TO RESPOND TO OFFICER'S SIGNAL TO STOP, a third degree felony; Count V: POSSESSION OF DRUG PARAPHENALIA, a class B misdemeanor; and Count VI: RECKLESS DRIVING, a class B misdemeanor; in the Fifth Judicial District Court in and for Washington County, State of Utah, the Honorable JAMES L. SHUMATE, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction to hear this appeal is conferred upon the above-entitled Court by §78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

STATEMENT OF THE ISSUES

1. Is it reversible error for the prosecution to fail to provide discovery or for the court to refuse to compel discovery?

a. Should the prosecution have been ordered to provide discovery regarding St. George police policies and procedures regarding hot pursuit?

b. Should the prosecution have been ordered to provide discovery regarding their rebuttal witness?

2. Was the Appellant prejudiced unfairly by having a defense witness appear before the jury in shackles and prison clothes?

3. Was the Appellant prejudiced by the court ordering a witness transported prior to being called as a defense witness?

4. was the Appellant entitled to being convicted of lesser included offenses only?

a Is the offense of failure to pay drug stamp tax a lesser included offense of possession of a controlled substance with intent to distribute?

b Is the offense of reckless driving a lesser

included offense of failure to respond to an officer's signal to stop?

5. Was there sufficient evidence given to the jury for the return of a conviction of possession of a controlled substance with intent to distribute?

6. Did the trial court abuse its discretion in sentencing appellant to consecutive sentences without the benefit of a presentence report?

STANDARD OF REVIEW

POINT I A & B: The standard of review is whether the discovery error by the State resulted in a resonable likelihood of a more favorable result for the Appellant. *State v. Fontana*, 680 P.2d 1042, 1048 (Utah 1984), cited in *Salt Lake City v. Reynolds*, 849 P.2d 582 (Utah App. 1993).

POINT II and III: Standard of review is to review the record evidence and determine from a totality of the circumstances whether the ruling is consistent with the guarantees of due process. *State v. Ramirez*, 817 P.2d 264, (Utah 1991).

POINT IV A & B: The question of an improper conviction (multiple sentences rather than lesser included offenses) is that of plain error, requiring a finding that (i) an error occurred, (ii) the error was obvious, and (iii) the error was harmful. *State v. Brooks (Brooks II)*, 908 P.2d 856, 861 (Utah

1995). *See also State v.* Menzies, 889 P.2d 393, 403 (Utah 1994)(citing *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

POINT V: The appellate Court is limited on a question of sufficiency of the evidence to the question of whether the jury could have found beyond a reasonable doubt that defendants were guilty. *See State v. Romero*, 554 P.2d 216 at 218,(Utah 1976), citing *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942).

POINT VI: *State v. Stettina*, 868 P.2d 108 at 109, (Utah App. 1994) sets out the standard of review for a question of an illegal sentence: it is a question of law, and questions of law are reviewed for correctness. *See also State v. Souza*, 846 P.2d 1313, 1320 (Utah App.1993).

PRESERVATION OF APPEAL ON THE RECORD

POINT I A: Counsel made a Motion to Compel regarding the policies and procedures of the St. George City Police, which was denied by the trial court. A record was made for preservation on appeal. *See generally Addendum to Appellant's Brief.*

POINT I B: When the State called Kassie McArthur as a rebuttal witness (*R.*, p. 680, l. 25 - p. 681, l. 1), the defense objected on the grounds of surprise and the State's failure to provide discovery (*R.*, p. 681, Ll.9-13). The objection was

overruled (*R.*, p. 681, Ll. 17-19).

POINT II: On the first day of trial and during the State's case in chief, the Court requested that a defense witness, Kim Randall, be called to testify out of turn and during the State's case in chief (*R.*, p. 457, l. 24 - p. 458, l. 9). That was done and when Kim Randall was brought into the courtroom after a brief recess, he was in shackles and an orange prisoner's uniform (*R.*, p. 460, Ll. 8-13). The jury had not seen Mr. Randall at that point. Defense counsel, on the record, objected to Mr. Randall appearing before the jury so dressed and in shackles (*R.*, p. 460, Ll. 3-7). The Court overruled the objection (*R.*, p. 461, l. 20 - p. 462, l. 8) and Mr. Randall testified before the jury in shackles and prisoner's clothes (*R.*, p. 463 - p. 482).

POINT III: The defense witness, Kim Randall, was brought to the trial from the Kane County Jail pursuant to a Transportation Order signed by the Trial Judge herein prior to the commencement of trial (*R.*, p. 114-115). That Order provided that Mr. Randall would be held at the Washington County Jail until the conclusion of trial (*Id.*, p. 115). At the conclusion of Mr. Randall's testimony on February 5, 1996, he was not excused by the Court (*R.*, p. 482). On the second day of trial, February 8, 1996, the defense called Mr. Randall to testify

during the Appellant's case in chief and was informed that Mr. Randall had been returned to Kane County (*R.*, p. 677, Ll. 12-18). The Court denied Appellant's request to call Kim Randall to testify in the Appellant's case in chief, and required defense counsel to give a proffer of Mr. Randall's proposed testimony (*R.*, p. 678, Ll. 6-10). The defense moved, on the record, for a mistrial and that motion was denied (*R.*, p. 679, l. 24 - p. 680, l. 5).

POINT IV A, B: Plain error may be reviewed by the Appellate court when raised for the first time on appeal. *See State v. Brooks (Brooks II)*, 908 P.2d 856 at 861.

POINT V: Sufficiency of evidence may be reviewed for the first time on appeal. *State v. Romero*, 554 P.2d 216 at 218,(Utah 1976), citing *State v. Laub*, 102 Utah 402, 131 P.2d 805 (1942).

POINT VI: An improper or illegal sentence may be raised at any time. *See State v. Brooks (Brooks II)*, *supra* at 860.

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

Utah Rules of Criminal Procedure, Rule 16(5)(b):

> The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

Utah Code Annotated §76-3-401(1),(3):

> (1) A Court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences for state offenses shall run concurrently unless the Court states in the sentence that they shall run consecutively.
>
> * * * * *
>
> (3) A court shall consider the gravity and circumstances of the offenses and the history, character and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

STATEMENT OF THE CASE

Appellant/Defendant (hereinafter "Appellant") was charged by Information with the following charges: Count I: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, a second degree felony; Count II: TAMPERING WITH EVIDENCE, a second degree felony; Count III: FAILURE TO PAY DRUG STAMP TAX, a third degree felony; COUNT IV: FAILURE TO RESPOND TO OFFICER'S SIGNAL TO STOP, a third degree felony; Count V: POSSESSION OF DRUG PARAPHENALIA, a class B misdemeanor; and Count VI: RECKLESS DRIVING, a class B misdemeanor.

The charges were taken to a jury trial before the Hon. James L. Shumate. After a two-day jury trial, Appellant was found guilty of all charges.

STATEMENT OF FACTS

The police alleged that on May 16, 1995, the Appellant was operating a motorcycle, east bound on St. George Boulevard when officer Stoker observed a tail light assembly on the motorcycle dangling down on the same (*Record*, page 327, lines 1-6); the officer turned on the motorcycle, observed the motorcycle turn left onto I-15 without signaling (*R.*, p. 327, Ll. 8-12), at which time the officer engaged in a high speed chase of the motorcycle south on I-15. *R.*, p. 328, Ll 7-11. According to the officer, the Appellant was throwing objects during the chase (*R.*, p. 329, l. 13 - p. 331, l. 14). Officer Stoker testified that the chase ended at the South St. George I-15 off-ramp where the Appellant's motorcycle ran into the a backup officer's patrol car (*R.*, p. 333, Ll. 2-8). The Appellant was then arrested.

Officer Stoker testified that after the arrest he and several other law enforcement officers went back to the freeway to search for the items he had seen thrown by the Appellant(*R.*, p. 343, Ll. 1-11). He found several pieces of hypodermic syringes (*R.*, p. 343, Ll. 19-24), and later found a small plastic bag with a white powdery substance inside of it (*R.*, p. 346, Ll. 2-10) which did not have a drug stamp affixed to it (*R.*, p. 353, Ll. 6-11). Jon Gerlitz from the State Crime Lab, in his testimony, identified the substance in the plastic bag as being

26.3 grams of methamphetamine (*R*, p. 451, Ll. 10-12).

During the proceedings herein the Appellant filed a Motion to Discover (*R.*, pp. 8-10) and later filed a Motion to Compel and pursuant to Rule 16 of the Rules of Criminal Procedure, the Appellant sought an order from the Court compelling the prosecution to provide Appellant with a copy of the St. George City Police Department's written Policies and Procedure regarding police officer's "fresh or hot pursuit." At a hearing held on the Motion on September 27, 1995, the Trial Judge denied Appellant's Motion to Compel from the bench. Apparently no written order was ever filed.[1]

This case was tried by jury and the trial started on February 5, 1996. On the first day of trial and during the State's case in chief, the Court requested that a defense witness, Kim Randall, be called to testify out of turn and during the State's case in chief (*R.*, p. 457, l. 24 - p. 458, l. 9). That was done and when Kim Randall was brought into the courtroom after a brief recess, he was in shackles and an orange prisoner's uniform (*R.*, p. 460, Ll. 8-13). The jury had not seen Mr. Randall at that point. Defense counsel objected to Mr. Randall

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[1]While there is nothing in the Court's Record to indicate a written Motion to Compel or a formal written Order regarding this matter, Appellant has obtained a certified transcript of the hearing in which the Motion to Compel was ruled upon, and includes the transcript as part of his Addendum to his Brief.

appearing before the jury so dressed and in shackles (*R.*, p. 460, Ll. 3-7). The Court overruled the objection (*R.*, p. 461, l. 20 - p. 462, l. 8) and Mr. Randall testified before the jury in shackles and prisoner's clothes (*R.*, p. 463 - p. 482).

The defense witness, Kim Randall, was brought to the trial from the Kane County Jail pursuant to a Transportation Order signed by the Trial Judge herein prior to the commencement of trial (*R.*, p. 114-115). That Order provided that Mr. Randall would be held at the Washington County Jail until the conclusion of trial (*Id.*, p. 115). At the conclusion of Mr. Randall's testimony on February 5, 1996, he was not excused by the Court (*R.*, p. 482). On the second day of trial, February 8, 1996, the defense called Mr. Randall to testify during the Appellant's case in chief and was informed that Mr. Randall had been returned to Kane County (*R.*, p. 677, Ll. 12-18). The Court denied Appellant's request to call Kim Randall to testify in the Appellant's case in chief, and required defense counsel to give a proffer of Mr. Randall's proposed testimony (*R.*, p. 678, Ll. 6-10). The defense moved for a mistrial and that motion was denied (*R.*, p. 679, l. 24 - p. 680, l. 5).

The State called Kassie McArthur as a rebuttal witness (*R.*, p. 680, l. 25 - p. 681, l. 1). The defense objected on the grounds of surprise and the State's failure to provide discovery

(*R.*, p. 681, Ll.9-13). The objection was overruled (*R.*, p. 681, Ll. 17-19). Months prior to trial the defense had, through its discovery motion, requested a list of witnesses that the State intended to call to testify at trial (*R.*, p. 9, ¶¶ 4, 6). The State had not listed Kassie McArthur on any witness list provided to the defense. The State brought Kassi McArthur from the Utah State prison to testify at the trial herein pursuant to an ex parte motion for transportation order dated January 25, 1996 (*R.*, p. 106), with said order dated January 30, 1996 (*R.*, p. 107). The trial started February 5, 1996 (*Id.*)

The Appellant was found guilty of all counts by the jury (*R.*, p. 759, l. 10 - p. 760, l. 9). The Appellant chose to waive the time for sentencing (*R.*, p. 762, Ll. 20-24), and the Court sentenced the Appellant to two consecutive terms of imprisonment of not less than one year and not more than fifteen years. The Appellant was also sentenced to serve two concurrent zero to five year terms and two concurrent County jail terms of six months with the balance of the two six month terms being suspended (*R.*, p. 769, l. 20-p. 772, l. 10).

SUMMARY OF THE ARGUMENT

POINT I, A: The Appellant requested two pieces of information from the State which were not in totality provided. First, Appellant informally requested from the State a copy of

the policies and procedures of St. George City Police regarding high speed chases. This request was denied by the State, and the Appellant brought the issue to the Court, which denied the motion. Was this denial of Appellant's Motion to Compel improper?

POINT I, B: The State called a witness at trial as a rebuttal witness, and gave no advance notice to Appellant that this witness would be called. Appellant had requested a list of the State's witnesses in his Motion for Discovery, and the State filed an ex parte transporation order with the Court more than a week prior to trial requesting this witness for the trial. Did the State violate their continuing duty to disclose discovery under Rule 16, Utah Rules of Criminal Procedure? Did the Court improperly deny Appellant's Motion for Mistrial? Did the Court fail to take measures that would have lessened the impact of the unexpected testimony on the Defendant?

POINT II: One of Appellant's witnesses, one Kim Randall, was in the custody of the Kane County Sheriff's Department, and testified in shackles and in a prisoner's uniform. Appellant had brought street clothes for Randall to dress in, and there was no concern discussed by the Court or the State that Randall would pose a security risk. The judge refused to have the shackles removed from Randall, and would not allow Randall to wear street clothes. Did this improperly prejudice the Appellant?

POINT III: Randall was ordered to be transported to the Washington County Jail from the Kane County Jail for purposes of testifying as a witness for the Appellant. The transporation order called for Randall to remain in Washington County until the conclusion of the trial. Appellant called Randall on the first day of trial, and wished to recall him on the second day of trial. Appellant was notified that Randall had been returned to the Kane County Jail prior to that time. The judge would not allow the Appellant to present to the jury a proffer as to what Randall's testimony would be. Appellant counted on the availability of Randall until the conclusion of the trial. Did Randall's unavailability unfairly prejudice the Appellant?

POINT IV: The Appellant is entited to be convicted of a lesser included offense if he is convicted of *two* offenses, one of which is the lesser included offense of the other. POINT IV A: Is the failure to pay drug stamp tax a lesser included offense of possession of a controlled substance with itent to distribute? POINT IV B: Is the offense of reckless driving a lesser included offense of failure to respond to an officer's signal to stop?

POINT V: The arresting officer testified that the Appellant threw certain items while trying to evade arrest. Items were later found on the well-traveled highway which the officer claimed were the same items that were thrown. Was there insufficient evidence presented by the State to tie this item of

evidence to the Appellant?

POINT VI: The Appellant waived the time for sentencing, and the Court sentenced the Appellant to consecutive terms for counts I and II without the assistance of a presentence report. Was this sentencing to consecutive sentences without objective, unbiased, information provided to the Court as to the Appellant's history, character and rehabilitative needs an abuse of discretion, and a violation of the provisions of Utah Code Annotated §76-3-401(3)?

ARGUMENT

POINT I. IS IT REVERSIBLE ERROR FOR THE PROSECUTION TO FAIL TO PROVIDE DISCOVERY OR FOR THE COURT TO REFUSE TO COMPEL DISCOVERY?

A. SHOULD THE PROSECUTION HAVE BEEN ORDERED TO PROVIDE DISCOVERY REGARDING ST. GEORGE POLICE POLICIES AND PROCEDURES REGARDING HOT PURSUIT?

Prior to the jury trial, Appellant requested discovery of the State, specifically requesting the policies and procedures of the St. George Police Department regarding hot pursuit. The reason for requesting this was that the Appellant was captured and arrested by police after a "hot pursuit" high speed chase. During this pursuit, the State claims that the Appellant threw items off of his person, which was later collected by police to be used as evidence against the Appellant. Appellant requested a copy of the policies and procedures of the St. George Police Department in an effort to determine whether or not the officer

conducted the pursuit in conformity with those policies and procedures. The State refused to disclose whether there were such policies and procedures, and the Trial Court refused to compel the State to disclose said information (*See, generally, Addendum*, p. 8, Ll. 19-25).

It is well settled that the prosecution must provide Appellant with discovery when requested pursuant to Rule 16, Utah Rules of Criminal Procedure. *See United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985) and *State v. Knight*, 734 P.2d 913, 916-917 (Utah 1987). The question is whether the policies and procedures of the St. George City Police Department would come within the scope of Rule 16.

In the area of inventory searches of seized vehicles, the Utah Supreme Court made it mandatory for inventory searches to be conducted in conformity with standardized, specific procedures. *State v. Shamblin*, 763 P.2d 425 (Utah App. 1988), following *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). The reason for the need of these procedures, *inter alia*, is to preclude the possibility that officers conducting the searches will act arbitrarily. *Shamblin, supra* at 428. In much the same way, Appellant should have been appraised as to whether or not there were policies and procedures of the St. George City Police Department regarding high speed chases. Did policies governing high speed chases exist? Did the officer conform to

those policies and procedures? Also, was the evidence later gathered in conformity with those policies? These questions were not answered, and the Court did not compel the State to answer. The Appellant was prejudiced by this: if the officer did not follow the proper hot pursuit procedures, this would be evidence to impeach the officer as to whether or not he would follow policies and procedures at other times. And, if there were policies and procedures governing high speed chases, and the gathering of evidence during and after high speed chases, whether or not the St. George City Police adhered to those policies would have had an impact as to whether or not the evidence was gathered properly, and possibly should have been suppressed at trail.

B. SHOULD THE PROSECUTION HAVE BEEN ORDERED TO PROVIDE DISCOVERY REGARDING THEIR REBUTTAL WITNESS?

The State called Kassie McArthur as a rebuttal witness (*R.*, p. 680, l. 25 - p. 681, l. 1). The defense objected on the grounds of surprise and the State's failure to provide discovery (*R.*, p. 681, Ll.9-13). The objection was overruled (*R.*, p. 681, Ll. 17-19). Months prior to trial the defense had, through its discovery motion, requested a list of witnesses that the State intended to call to testify at trial (*R.*, p. 9, ¶¶ 4, 6). The State had not listed Kassie McArthur on any witness list provided to the defense. The State brought Kassi McArthur from the Utah State prison to testify at the trial herein pursuant to an ex

parte motion for transportation order dated January 25, 1996 (*R.*, p. 106), with said order dated January 30, 1996 (*R.*, p. 107). The trial started February 5, 1996 (*Id.*)

It is clear that the State knew, well in advance of the trial, that they were going to call Kassie McArthur as a witness. Yet, until McArthur was called on day two of the jury trial, the defense was not on notice that she would be called. The United States Supreme Court recognized that the prosecutor in a criminal case has a duty to disclose this kind of information when requested: "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs*, 427 U.S. 97, 107, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976). The Utah Supreme Court spelled out the duties of the criminal prosecutor as to discovery in *State v. Kallin*, 877 P.2d 138 (Utah 1994):

> In criminal prosecutions, the State has two independent obligations to provide evidence to the defense. First, the State has a duty under the Due Process Clause of the United States Constitution to provide, without request by the defendant, all exculpatory evidence. *State v. Worthen*, 765 P.2d 839, 850 (Utah 1988); *State v. Carter*, 707 P.2d 656, 662 (Utah 1985). Second, when required by court order, the State must disclose evidence pursuant to Rule 16 of the Utah Rules of Criminal Procedure. The practice in this state, at least in some districts, is for the prosecutors to make all inculpatory evidence available to the defense on request. See Utah R.Crim.P. 16(a)(3).
>
> Whether prosecutors produce inculpatory evidence under court order or on request, they have a duty to comply fully and forthrightly. In *State v. Knight*, 734

> P.2d 913, 916-17 (Utah 1987), this Court held that when the prosecution makes a voluntary disclosure of inculpatory evidence to a defendant, the prosecution must produce all the requested material or identify those portions not disclosed. If evidence is disclosed, the prosecutor has a continuing obligation to disclose newly acquired information so as to avoid misleading the defense.

Kallin, 877 P.2d at 143.

The State had already responded in part to Appellant's discovery request; the State had disclosed to Appellant the witnesses who were to be called, short of McArthur. The non-disclosure was more than just a procedural irregularity; it turned the trial of Appellant into a contest between the State and Appellant rather than being a search for truth. As the Utah Supreme Court remarked in *State v. Carter*, 707 P.2d 656 (Utah 1985):

> As we have several times noted, a criminal proceeding is more than an adversarial contest between two competing sides. It is a search for truth upon which a just judgment may be predicated. Procedural rules are designed to promote that objective, not frustrate it. When a request or an order for discovery is made pursuant to Sec. 77-35-16(a), a prosecutor must comply. To meet basic standards of fairness and to ensure that a trial is a real quest for truth and not simply a contest between the parties to win, a defendant's request for information which has been voluntarily complied with, or a court order of discovery must be deemed to be a continuing request. And even though there is no court-ordered disclosure, a prosecutor's failure to disclose newly discovered inculpatory information which falls with the ambit of Sec. 77-35-16(a), after the prosecution has made a voluntary disclosure of evidence might so mislead defendant as to cause prejudicial error.

Carter, 707 P.2d at 662

In not granting the Appellant's Motion for a Mistrial, and in not continuing *sua sponte* the trial for at least some time to allow the defense to prepare adequately for the testimony of McArthur, the Appellant was denied a fair trial.

The testimony of McArthur was extremely damaging to Appellant's case. McArthur testified that she had witnessed the pursuit between the police and Appellant (*R.*, p. 685, Ll. 19-25). She also testified that Appellant had asked her to tell police that she had not seen Appellant throwing anything, even though that would not be true (*R.*, p. 686, Ll. 21-24). McArthur did give a statement to law enforcement — a copy of which was not disclosed, again, to Appellant (*R.*, p. 687, l. 20 - p. 688, l. 7). The State had McArthur read portions of the statement which referred to Appellant physically threatening her to make exculpatory statements in his behalf to police (*R.*, p. 689, l. 22 - p. 691, l. 5).

Hence, this witness was an acquaintence of the Appellant, was there (or close to) at the time of the events that led to Appellant's arrest, and testified that, not only did he confess to her that he had thrown a bag of methamphetamine, but he also threatened her if she did not give certain testimony to law enforcement — itself a separate crime, that being witness tampering.

While Appellant's counsel was able to cross-examine McArthur regarding the statement given to law enforcement, had Appellant known that the State was planning on calling her as a witness, Appellant, along with Appellant's counsel and the private investigator who was working for the Appellant, could have assisted Appellant in preparing for McArthur's testimony.

This certainly constitutes the kind of credible argument that the defense was impaired by the non-disclosures by the State. Let us note, it is not just the non-disclosure of McArthur as a witness, but the allied non-disclosure of the statement given by McArthur to law enforcement. The next step here is outlined in *State v. Knight, Supra* at 921:

> Therefore, when the defendant can make a credible argument that the prosecutor's errors have impaired the defense, it is up to the State to persuade the court that there is no reasonable likelihood that absent the error, the outcome of trial would have been more favorable for the defendant.

Given the devestating nature of McArthur's testimony, it is highly likely that McArthur's testimony was outcome determinative...but may not have been had the Appellant had time to prepare. What happened in this case is precisely what had happened in *Salt Lake City v. Reynolds*, 849 P.2d 582 (Utah App. 1993). Like in *Reynolds*, this is not a case of the prosecutor complying fully with the discovery request. This is not a case of the prosecutor partially complying with the discovery request.

This is not a case of the prosecutor refusing to comply with the discovery request, and then seeking to justify that refusal. This is a case of the prosecutor *ignoring* the discovery request. Given that response (or lack thereof), the Appellant could logically assume that it did not exist; i.e., that McArthur would not be called as a witness. Appellant was thus denied a reasonable opportunity to compel disclosure of the information the State had in their file regarding McArthur. The testimony provided by McArthur was highly prejudicial. Hence, the conviction sould be reversed and remanded for a new trial.

POINT II. WAS THE APPELLANT PREJUDICED UNFAIRLY BY HAVING A DEFENSE WITNESS APPEAR BEFORE THE JURY IN SHACKLES AND PRISON CLOTHING?

As noted in the facts above, Defense counsel objected to Mr. Randall appearing before the jury dressed in jail overalls and in shackles (*R.*, p. 460, Ll. 3-7). The Court overruled the objection (*R.*, p. 461, l. 20 - p. 462, l. 8) and Mr. Randall testified before the jury in shackles and prisoner's clothes (*R.*, p. 463 - p. 482).

A criminal defendant's right to a fair trial is a fundamental liberty secured by the fourteenth amendment. *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 1692, 48 L.Ed.2d 126 (1976); *State v. Mitchell*, 824 P.2d 469, 473 (Utah App. 1991). While the right to remain without shackles, and thus retain the

"garb of innocence" is a right retained by the Defendant, it should be extended as well to witnesses for the Defendant, especially where non-jail clothing is provided, and there is no perceived security threat. For the Defendant to have a witness testify in shackles and jail overalls is probably the same as not having a witness at all. For the trial court to have allowed the witness to testify in such a way deprived the Appellant of a fair trial; the verdict should be overturned and remanded for a new trial.

III. WAS THE APPELLANT PREJUDICED UNFAIRLY BY THE COURT ORDERING A WITNESS TRANSPORTED PRIOR TO BEING CALLED AS A DEFENSE WITNESS?

Again, under an analysis of the Appellant having the right to a fair trial, *Estelle, supra, Mitchell, supra,* Appellant's witness was unavailable to be called, as the Court had returned him to the Kane County Jail prior to the conclusion of the trial (*R.*, p. 677, Ll. 12-18), contravening the Court's own transportation order (*R.*, pp. 114-115). The Court denied Appellant's request to call Kim Randall to testify in the Appellant's case in chief, and required defense counsel to give a proffer of Mr. Randall's proposed testimony (*R.*, p. 678, Ll. 6-10). The defense moved for a mistrial and that motion was denied (*R.*, p. 679, l. 24 - p. 680, l. 5).

While the Court found that the testimony proffered was "cumulative" to what was testified the day before (*Id.*), Defense

counsel was caught off guard, and was not able to articulate the full range of questioning that he was planning on asking the witness. Further, the answers to questions on direct testimony could have elicited questions beyond those stated to the Court by counsel.

Appellant has the burden of producing a marshalling of the evidence, and thus must point out that the Utah Supreme Court has held that "we will not set aside a verdict because of the erroneous exclusion of evidence unless a proffer of evidence appears of record, and we believe that the excluded evidence would probably have had a substantial influence in bringing about a different verdict." *State v. Rammel*, 721 P.2d 498, 499 (Utah 1986). While the excluded testimony from the witness, by itself, may not be enough to conclude that the Appellant did not receive a fair trial, it should be taken in light of the other errors at trial, not the least of which was the rebuttal witness called as a surprise by the prosecution. It is unknown whether Randall could have provided rebuttal testimony to the testimony of McArthur, but the testimony of McArthur was not known until the day of trial, and even if Randall could have impeached her testimony, he was in Kane County. Based on these concerns, this error, in concert with all other errors discussed in Appellant's Brief, the cumulative impact of the inadmissible testimony and evidence created reversible error by tending to prejudice the

rights of the Appellant. "'Cumulative error' refers to a number of errors which prejudice [a] defendant's rights to a fair trial." *Bundy v. Deland*, 763 P.2d 803, 806 (Utah 1988); *State v. Ellis*, 748 P.2d 188 (Utah 1987); *State v. Rammel*, 721 P.2d 498, 501-02 (Utah 1986); *See also State v. St. Clair*, 3 Utah 2d 230, 282 P.2d 323 (1955); *Gooden v. State*, 617 P.2d 248 (Okla.Crim.App.1980); *State v. McKenzie*, 186 Mont. 481, 608 P.2d 428, 448, *cert. denied*, 449 U.S. 1050, 101 S.Ct. 626, 66 L.Ed.2d 507 (1980).

IV. WAS THE DEFENDANT ENTITLED TO BE CONVICTED OF A LESSER INCLUDED OFFENSES ONLY?

A. IS THE OFFENSE OF FAILURE TO PAY DRUG STAMP TAX A LESSER INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE?

Under Utah law, a criminal defendant cannot be convicted of both a stated crime and a lesser crime that is necessarily included in the proof of the greater. *See State v. Brooks (Brooks II)*, 908 P.2d 856, 858 (Utah 1995); *State v. Bradley*, 752 P.2d 874, 877 (Utah 1985)(per curiam); *State v. Hill*, 674 P.2d 96, 97 (Utah 1983). A thorough analysis requires two steps: first, a theoretical comparison of the elements of the crimes claimed to be in a lesser included relationship. *Brooks II, supra* at 861. Such a theoretical comparison of the elements of Possession of a Controlled Substance with Intent to Distribute,

and Failure to Pay Drug Stamp Tax, is as follows:

Possession of a Controlled Substance with Intent to Distribute (a second degree felony):

1. The Defendant knowingly and intentionally
2. Possessed a controlled substance
3. In Washington County, State of Utah
4. With the intent to distribute.

Utah Code Annotated, §58-37-8(1)(a)(iv).

Failure to Pay Drug Stamp Tax

1. The Defendant knowingly and intentionally
2. In Washington County, State of Utah
3. Possessed a controlled substance (as defined in Utah Code Annotated §58-37-2)
4. And be a dealer of the controlled substance, meaning that the amount of the controlled substance must measure at least seven grams.
5. For which he did not pay the requisite tax.

Utah Code Annotated §§59-19-102, 104 & 105.

In both of the statutes, it is necessary for the Defendant charged to possess a controlled substance. Both statutes also look to the quantity of controlled substances possessed. In the case of Possession with Intent to Distribute, the Courts have held that the quantity of the controlled substance is indicative of whether or not there was intent to

distribute. "Where one possesses a controlled substance in a quantity too large for personal consumption, the trier of fact can infer that the possessor had an intent to distribute. *State v. Anderton*, Utah, 668 P.2d 1258, 1262 (1983)." *State v. Fox*, 709 P.2d 316, 320 (Utah 1985). The Drug Stamp Tax statute requires that the person possessing the controlled substance be a "dealer", which is statutorily defined as one having been found possessing over 7 grams of the controlled substance. Hence, both will look to the quantity of the substance to determine whether the law has been violated. Thus far, the evidence to support a conviction of Possession with Intent to Distribute necessarily includes evidence of Failure to Pay Drug Stamp Tax.

The Drug Stamp Tax statute does require that the accused purchase a drug stamp, a requirement not found in Possession with Intent to Distribute. However, it is generally recognized that the Drug Stamp Tax act is one that is uniformly not complied with. Appellant is unaware of any case in which a defendant arrested with a sizeable quantity of a controlled substance actually had a drug stamp affixed to it. In every other way, a conviction for possession of a controlled substance with intent to distribute necessarily includes conviction of failure to pay drug stamp tax. Hence, Failure to Pay Drug Stamp Tax should be considered to be a lesser included offense of Possession of a Controlled Substance with Intent to Distribute, and the

Appellant's conviction for Possession of a Controlled Substance with Intent to Distribute should be dismissed.

B. IS THE OFFENSE OF FAILURE TO RESPOND TO OFFICER'S SIGNAL TO STOP A LESSER INCLUDED OFFENSE OF RECKLESS DRIVING?

The analysis here is the same as POINT IV A above. The elements of Failure to Respond to an Officer's Signal to Stop are as follows:

1. The Defendant knowingly and intentionally
2. In Washington County, State of Utah
3. Having received a visual signal from a peace officer to bring his vehicle to a stop
4. Operates his vehicle in a willful and wanton disregard of the officer's signal
5. So as to interfere with or endanger the operation of any vehicle or person, or who attempts to flee or elude a peace officer by vehicle or other means.

Utah Code Annotated §41-6-13.5(1)

The elements of reckless driving are:

1. The Defendant knowingly and intentionally
2. In Washington County, State of Utah
3. Operated a motor vehicle in willful or wanton disregard for the safety of persons or property.

Utah Code Annotated §41-6-43.

In the Failure to Respond statute, the element of willful or wanton disregard of the officer's signal to stop is akin to a willful and wanton disregard for the safety of persons or property, as that will be the logical outcome of such a disregard of the officer's signal. Hence, conviction of Failure to Respond necessarily includes a conviction of Reckless Driving, and the conviction of Failure to Respond should be overturned.

POINT V: WAS THERE SUFFICIENT EVIDENCE GIVEN TO THE JURY FOR THE RETURN OF A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE?

According to Officer Stoker, the Appellant was throwing objects away during the high speed chase. When this happened, Officer Stoker was chasing the Appellant on Southbound Interstate 15, where the highway by and over various streets in St. George (*R.*, p. 329, l. 13 - p. 331, l. 14). Officer Stoker testified that the chase ended at the South St. George I-15 off-ramp where the Appellant's motorcycle ran into the a backup officer's patrol car (*R.*, p. 333, Ll. 2-8). The Appellant was then arrested.

Officer Stoker testified that after the arrest he and several other law enforcement officers went back to the freeway to search for the items he had seen thrown by the Appellant(*R.*, p. 343, Ll. 1-11). He did not ever find the first item that he saw the Appellant throw. (*R.*, p. 369, Ll. 7-9). He did find several pieces of hypodermic syringes (*R.*, p. 343, Ll. 19-24),

and later found a small plastic bag with a white powdery substance inside of it (*R.*, p. 346, Ll. 2-10).

Jon Gerlitz from the State Crime Lab, in his testimony, identified the substance in the plastic bag as being 26.3 grams of methamphetamine (*R*, p. 451, Ll. 10-12).

Testimony was received from Officer Staley that I-15, between the Nevada border and I-70 (north of St. George) is a major drug corridor, with drugs coming traveling on I-15 from "everywhere" (*R.*, p. 531, l. 6 - p. 532, l. 8). The question here is whether there was sufficient evidence presented to the jury to reasonably tie in the drugs found with the Appellant. The officer saw two items being thrown; one, what the officer thought was a handgun, was never recovered (*R.*, p. 385, Ll. 2-3). Near the point on I-15 where the officer saw the Appellant throw a baggie, he found a bag with syringes and plungers (*R.*, p. 376, Ll. 12-17). Officer Stoker only testified to seeing two items thrown from the motorcycle during the pursuit, and one was not described as a baggie. The baggie found by Officer Stoker which contained the large quantity of methamphetamine was not in the same area where he saw items thrown; in fact, it was on the other side of the highway (*R.*, p. 382, Ll. 8-17).

The standard used by the Utah Supreme Court for determining sufficiency of the evidence is "to require that it be so inconclusive or so inherently improbable that reasonable minds

could not reasonably believe defendant had committed a crime. Unless there is a clear showing of lack of evidence, the jury verdict will be upheld." *State v. Romero*, 554 P.2d 216 (Utah 1976)(footnotes omitted). While that is a high burden, Appellant believes that it is met here. Not only is the baggie in an area different from where the officer believed the baggie was thrown, but that area of I-15 was known by law enforcement as a major drug corridor, with literally hundreds of other vehicles that could have left the baggie with the methamphetamine in it. The lack of evidence tying this baggie to the Appellant leaves the sufficiency of the evidence given to the jury in doubt, and their verdict as well.

POINT VI: DID THE TRIAL COURT ABUSE ITS DISCRETION IN SENTENCING APPELLANT/DEFENDANT TO CONSECUTIVE SENTENCES?

The Appellant was found guilty of all counts by the jury (*R.*, p. 759, l. 10 - p. 760, l. 9). The Appellant chose to waive the time for sentencing (*R.*, p. 762, Ll. 20-24), and the Court sentenced the Appellant to two consecutive terms of imprisonment of not less than one year and not more than fifteen years. The Appellant was also sentenced to serve two concurrent zero to five year terms and two concurrent County jail terms of six months with the balance of the two six month terms being suspended (*R.*, p. 769, l. 20-p. 772, l. 10). The Court did so without a presentence report or any other objective information regarding

the Appellant's history, character and rehabilitative needs. Utah Code Annotated §76-3-401 reads, in relevant portion, as follows:

> (1) A Court shall determine, if a defendant has been adjudged guilty of more than one felony offense, whether to impose concurrent or consecutive sentences for the offenses. Sentences for state offenses shall run concurrently unless the Court states in the sentence that they shall run consecutively.
>
> * * * * *
>
> (3) A court shall consider the gravity and circumstances of the offenses and the history, character and rehabilitative needs of the defendant in determining whether to impose consecutive sentences.

Clearly, first, is a presumption of concurrent sentences in §76-3-401(1). Consecutive sentences, per subsection (3), *shall* consider several factors, not the least of which are "the history, character and rehabilitative needs of the defendant" before imposing a consecutive sentence.

This statute has been reviewed previously. In *State v. Lee*, 656 P.2d 443 (Utah 1982), Lee was contesting his committment to consecutive sentences, similarly questioning whether the judge complied with subsection (3). While the Utah Supreme Court there found that the judge's sentence was justified, it also referred to a presentence report that was prepared in that case to justify its decision. *Lee, supra* at 444. In *State v. Deli*, 861 P.2d 431 (Utah 1993), while there is no mention of a presentence report having been prepared, the Court does discuss the fact that Deli

had previously been incarcerated at the Utah State Prison, and that he was a fugitive from justice when the underlying crimes were committed, *Id* at 435, suggesting information available to the trial court commonly obtained through a presentence report.

In the instant case, the Trial Court noted its lack of information at the time of sentencing:

> As you well know, the matters before the Court are serious. Each of them carry 1 to 15 years incarceration in the Utah State Prison, and that is by legislative determination. *Without further information*, with only the bold recordof the facts and circumstances that I have heard during trial, I am given little, if any opportunity, to more carefully review this matter.

R., p. 763, Ll. 4-11, emphasis added.

The Court then later remarked:

> I may not have the ability to do much other than to impose the sentence. If you wish me to do so, and it is my job and my duty I will do that if it is your request, *but I would be remiss if I told you that I would not also benefit from a presentence report.*

R., p. 763, l. 22 - p. 764, l. 2.

The Appellant did briefly address the Court (*R.*, p. 765, l. 16 - p. 766, l. 17). The prosecutor then addressed the Court and recommended consecutive sentences, based on Appellant having previously been incarcerated in California and Appellant's criminal history (*R.*, p. 766, l. 20 - p. 767, l. 6), although there was no depth in discussing either the incarceration or the criminal history. Appellant then addressed the Court in rebuttal, and discussed briefly his past and his ability to be

rehabilitated (*R.*, p. 767, l. 16 - p. 769, l. 3). The Court then proceeded to have the sentence on counts I and II run consecutive (*R.*, p. 770, Ll. 22-25).

While there was discussion of the Defendant's history, character and rehabilitative needs, none of the information given to the judge was by disinterested parties. Prior to imposing consecutive sentences, the judge should have insisted on a presentence report, or not sentenced Appellant to consecutive sentences. Hence, Appellant requests this Court to vacate his current sentence and remand this matter back to trial court for sentencing in accordance with §76-3-401(3).

CONCLUSION

For the foregoing reasons, Appellant requests that this Court find that the conviction of Appellant was in error, and that the conviction be reversed, with a remand to the trial court for a new trial. In the alternative, Appellant requests that the sentence imposed be vacated, and the case be remanded to the trial court to determine what an appropriate sentence should be for the Appellant.

ADDENDUM

Attached hereto is a copy of the transcript of the videotape regarding Appellant's Motion to Compel, which was heard on September 27, 1995. The Court Reporter filed the original of this transcript with the District Court rather than with the Court of Appeals, and the original had not yet made it to the Court's Record at the time of the writing of Appellant's Brief. Hence, Appellant provides a copy of the transcript as an Addendum.

VAN FLEET COURT REPORTING
Registered Professional Reporters
J. Elizabeth Van Fleet, RPR, CSR
P.O. Box 2702
St. George, Utah 84771-2702
(801) 652-9971

August 19, 1996

District Court Clerk, Wash. County
220 North 200 East
St. George, Utah 84770

RE: State of Utah vs. Kenneth D. Souza
Case 951500570/Washington County

Dear Clerk:

Enclosed is the original transcript of the videotape, in the above-referenced matter, taken on September 27, 1995, at St. George, Utah. Please have it filed with the Court. Thank you.

Sincerely,

J. Elizabeth Van Fleet

J. Elizabeth Van Fleet
RPR, CSR

evf
pc: Jim R. Scarth, Esq.

IN THE FIFTH DISTRICT - St. George COURT

WASHINGTON COUNTY, STATE OF UTAH

COPY

STATE OF UTAH,
Plaintiff,
vs.
KENNETH D. SOUZA,
Defendant.

Case No. 951500570 FS

REPORTER'S TRANSCRIPT OF VIDEOTAPE

BEFORE THE HONORABLE JAMES L. SHUMATE

Wednesday, September 27, 1995

APPEARANCES:

For the State: Eric Ludlow, Esq.

For the Defendant: Jim R. Scarth, Esq.

Reported by: J. Elizabeth Van Fleet, RPR, CSR

ST. GEORGE, WASH., CO., UT., WED., SEPT. 27, 1995

-oOo-

P R O C E E D I N G S

THE COURT: Item 41 on the calendar, 951500570, State of Utah versus Kenneth Duane Souza. Mr. Souza is present, together with his counsel, Mr. Scarth. Mr. Scarth, Mr. Souza you claim is indigent, and you need transcripts and an investigator. Is that what you're looking for as well as a motion to compel discovery?

MR. SCARTH: Yes, Your Honor.

THE COURT: All right. I'll hear you with respect, first, to indigency.

MR. SCARTH: Okay. And -- those two items, and then at the end I'll request the opportunity to address the bail situation. So some of my remarks will apply to the request for appointment of an investigator, transcripts. Some will apply to bail, but they -- they're -- I think they're all applicable to those two.

Your Honor, Mr. Souza has been in jail since the 2nd of July. In this case he has bail set at 50,000 cash only. There was another insubsequent case wherein bail was set at 10,000 cash only, but

that case has been dismissed by this Court recently.

At the time he was brought before the Court on the case that's now been dismissed, this Court revoked his bail, which had been posted by Beehive Bail Bonding, in the form of a bond, $15,000. Since he's been incarcerated, his mother has become seriously ill. I have an exhibit in that respect, and I'll give a copy to counsel.

The reason of that is relevant, Your Honor, is -- is that Mr. Souza has a 14-year-old daughter and he has the care, custody, and control of her, and she's been with his mother in Myton, Utah since February of 1994. And her mother -- his mother is now unable to financially support Mr. Souza's daughter.

What I'm leading up to, Your Honor, is since he's been incarcerated since July 2nd he's been unemployed, been and unable to meet any of those obligations. He has extinguished his assets as a result of lawyer fees, and there's just nothing left.

His mother is scheduled for open-heart surgery. He needs to be out working, and so if the Court does grant the motion it may be on -- the

motion for transcripts and funds for an investigator, it may be on a temporary basis. If the Court would review it later, it might find that he's employed and no longer entitled to those items. But as I say I'm also addressing the bail question.

He has located employment in Myton. He needs to be there living with his mother and daughter. He would work for American Towing, which is owned by Robert Essex in Myton. He has -- Mr. Souza has worked there before. In fact, he sold that business to Robert Essex. The defendant, as I probably already mentioned, plans to live in Myton with his mother and daughter.

THE COURT: When is the surgery scheduled, counsel?

THE DEFENDANT: I'm not sure, Your Honor. I talked to my mother last night. Her doctor has scheduled it. (Inaudible.) I didn't ask for a date. It's soon, though. She has had one bypass -- triple bypass this year, and she's having heart failure again. And not only she's not financially able to support my daughter, physically she's -- and I've raised her since she's four years old. She's a straight "A" student. She's a good girl. And by me

not being there, she's somewhat getting herself in a little bit of trouble because my mother is not able to supervise her.

MR. SCARTH: Also his mother is being evicted. She's without funds. The child, of course, needs school clothing and other things.

But in connection with the motion for transcript and investigator, I have talked with an investigator, that's Mr. Jack Lasswell of St. George, Utah. He's present in the courtroom. He's prepared to state to the Court or testify to the Court as to his fees.

What we would need to be investigated is that my client advises that he recognized the occupants of other vehicles during the alleged high speed chase. We need to have them investigated. We need some photographs taken. So it's --

THE COURT: Have you got a ceiling on it, counsel? Can I authorize up to a given dollar figure?

MR. SCARTH: Yeah. For now, I think a thousand dollars would be -- would cover it, Your Honor.

THE COURT: Okay.

MR. SCARTH: On transcripts, we need a

transcript of the preliminary hearing in this case. I reserve the right to file motions that would normally be filed at arraignment time. I intend to file a motion for quash and remand. I need a transcript for that purpose.

I think I've already mentioned it on the bail issue. Well, let me address that a little more specifically. The statute, which is Section 77-20-1, and I'll hand a copy to the Court and counsel.

THE COURT: I have it hear, counsel, if I need to look at it.

MR. SCARTH: All right. I'll hand one to counsel. Provides as follows: A person charged with, arrested for a criminal offense shall be admitted to bail as a matter of right except if the person is charged with (A) and then subparagraph (B) felony while on probation or parole or while free on bail awaiting trial on a previous felony charge when there is substantial evidence to support the current charge, or, felony, when there is substantial evidence to support the charge and the Court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee

jurisdiction -- the jurisdiction of the Court if released on bail.

Mr. Souza has had business in this court prior to these two recent arrests. To my knowledge, he's never failed to appear so the flight risk isn't a problem. There's been no evidence presented or was no evidence presented when the Court revoked bail and set it at 50,000 cash only, that there was, under subparagraph B, substantial evidence to support that charge or the one in Kane County.

There was no substantial evidence presented, and I doubt that there will be any presented today, by a clear and convincing standard that this person would constitute a substantial danger to any other person or to the community. So I have those two matters. I'll address the motion to compel now or -- (inaudible.)

THE COURT: Go ahead. Let's hear your motion to compel.

MR. SCARTH: On the motion to compel, I also have some exhibits, Your Honor. I'll hand copies to counsel. Your Honor, early in the stages of this case I filed more or less a routine motion to discover. Thereafter, on August 1, 1995, I sent a letter -- an informal letter to Mr. Ludlow

requesting a document as discovery, that document being the St. George City Police Department's portion of their policies and procedures that apply to fresh pursuit.

Mr. Ludlow made, I believe, reasonable efforts to produce that but then had to advise me that the Chief of Police would not turn that document over to him for copying and supply me with a copy at which point I filed, under the GRAMMA Act in Utah, a records request of the City of St. George requesting that item.

Thereafter, as you'll see from the exhibit, I got a notice of denial. Why do we need that document? We need that document, Your Honor, because the police reports indicate that during the alleged hot pursuit or fresh pursuit that the patrolling officer traveled up to speeds of 115 miles per hour.

I believe that I may find in those policies that that's a violation of St. George City Police's policies, and if it is, that would go to the credibility of the officer, and it would also lead me into an area of if he would violate that policy or that procedure, would he violate others in this investigation and arrest. I'll submit it.

THE COURT: All right. Counsel, with respect to your discovery motion, your request is denied. The Court looks at the matter and determines it as follows: The existence of a speed limit cap on a fresh or hot pursuit policy of the St. George City Police Department, and whether or not such a cap was exceeded by the pursuing officer in this matter -- and I take specific notice that I was the judge who heard the preliminary hearing in this matter and listened to the testimony carefully and have that testimony clearly in mind at this time -- the Court's determination is that whether or not that officer at the time either intentionally or inadvertently determined to violate that cap is wholly and entirely collateral to the issues of this case.

I do not find that there is a significant connection for relevance terms between that policy and the actions of the officer and the credibility of the officer under this case under the circumstances that the officer was, in fact, in hot pursuit behind a vehicle that was not responding to his signal to stop, that the officer observed items being thrown from that vehicle and testified as such, and I see no causal connection. Based upon

that, I deny your discovery motion. Mr. Scarth, you have got your record. Do you need any further delineation on that?

MR. SCARTH: No. I think you have given your grounds, Your Honor.

THE COURT: All right. Now, with respect to the determination of indigency, Mr. Ludlow, what's the State's position on that?

MR. LUDLOW: Your Honor, the State believes that Mr. Souza has retained counsel, some of the things he's asking for I believe that Mr. Scarth can provide as part of his representation. We would also like the Court to inquire into Mr. Souza's indigency status by going through a hearing to determine that.

THE COURT: I would ordinarily swear Mr. Souza at this time, counsel, to make that determination.

MR. SCARTH: That's fine.

THE COURT: Mr. Souza, would you, again, as best you can, raise your right hand and take an oath.

(Whereupon, Kenneth Duane Souza was sworn by the judge.)

THE COURT: All right. Do you have a job,

sir?

THE DEFENDANT: No, sir.

THE COURT: You have been incarcerated since July the 2nd of 1995, and that's accurate, sir?

THE DEFENDANT: That's correct.

THE COURT: All right. Do you have any personal property by way of motor vehicles, bank accounts, furnitures, fixtures, anything not subject to -- not exempt from execution worth more than $500?

THE DEFENDANT: Well, yes and no. If Mr. Ludlow would return some of my stuff --

THE COURT: Well, if it is in police custody, it is probably not --

THE DEFENDANT: I don't have nothing.

THE COURT: -- to be counted.

THE DEFENDANT: Absolutely nothing.

THE COURT: All right. Do you own any land or real estate anywhere, sir?

THE DEFENDANT: No, sir, I do not.

THE COURT: All right. Mr. Ludlow, any areas of inquiry you think we ought to cover?

MR. LUDLOW: No, I believe that covers it, Your Honor.

THE COURT: Mr. Souza, I find that you are in deed indigent. Accordingly, the cost of transcripts will be paid for by Washington County.

MR. LUDLOW: Your Honor, before the Court makes that determination, I received a letter from Mr. Souza, and if I could have the bailiff -- this indicates he has a motor vehicle that's valued at $5,000 that does not a have a lien on it, lienholder's or any claim. St. George Police does have that vehicle in impound right now.

I think that -- that perhaps, well, with an order of the Court, we could sell that vehicle or do whatever and that would provide for the things that he's asking for, transcripts, investigator fees, whatever. I believe he does have $5,000 here as what he is claiming the value of that motor vehicle.

THE COURT: What is the authority of the police department to hold this asset, counsel?

MR. LUDLOW: Your Honor, we have had that vehicle. Mr. Souza claims that that is his vehicle. He's never provided any documentation. There's another gentleman who also claims ownership to that vehicle. So the position of St. George Police Department and the City Attorney's Office,

until they receive documentation as to whose vehicle that is, they don't want to release it to anyone.

THE DEFENDANT: Your Honor, if I may say something, please.

THE COURT: No. Counsel, my concern is Mr. Souza is now in custody. He is facing a most serious felony charge, and if there are resources here that can be used, if he's got a claim to the vehicle, I don't think this is the appropriate forum in which to adjudicate title of that vehicle. I don't even know who the other person is.

I'm going to determine that if St. George City is holding onto it, for reasons known only to themselves, Mr. Souza certainly doesn't have access to it. Whether he does or doesn't have title, I can't determine at this point.

The Court's order is that he'll have transcripts. I will authorize payment of $500 for investigator expense, and if that is not enough, Mr. Scarth, come back to the Court and we'll see where we are there.

MR. SCARTH: Thank you, Your Honor.

THE COURT: Anything else, Mr. Scarth? You want to submit the bail issue?

MR. SCARTH: Yes. As to bail, Your Honor,

I would request the Court to reinstate Beehive Bail Bonding $15,000 bond, and I've stated my reasons. The main reasons revolves around his mother and his daughter and their need to have him with them and to have him out working to provide for them.

THE COURT: All right. Counsel, I take that well in mind, and I am more than slightly troubled by Mr. Souza's mother's physical condition and her inability to care for a 14-year-old child. But this Court found by not only probable cause, but I will put it on the record now, from the preliminary hearing, this Court found clear and convincing evidence, that it was described to this Court as a fist-sized rock of methamphetamine was recovered in the investigation of this case.

Methamphetamine is, in fact, responsible for the majority of the criminal cases -- active criminal cases on this Court's docket at the present time. Those who possess such quantities are a clear and present danger to this community. By clear and convincing evidence, Mr. Souza falls into that category. Your bail request is denied.

MR. LUDLOW: Thank you, Your Honor.

MR. SCARTH: Your Honor, it's presently set at 50,000 cash only. Could that be cash or

bond?

THE COURT: Cash only is the order.

MR. LUDLOW: Thank you, Your Honor.

(Thereupon, the proceedings were concluded.)

CERTIFICATE OF NOTARY

STATE OF UTAH)

) ss

COUNTY OF WASHINGTON)

I, J. Elizabeth Van Fleet, a duly commissioned Notary Public, Washington County, State of Utah, do hereby certify:

That I reported stenographically the foregoing videotape at the time and place hereinbefore set forth.

That thereafter said shorthand notes were transcribed into typewriting and that the typewritten transcript of said videotape is a complete, true and accurate transcription of my said shorthand notes taken down at said time, to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal of office in the County of Washington, State of Utah, this 19th day of August, 1996.

J. Elizabeth Van Fleet

J. Elizabeth Van Fleet, RPR, CSR

DATED this 12 day of September, 1996.

THOMAS A. BLAKELY
JIM R. SCARTH
Attorneys for Appellant

CERTIFICATE OF DELIVERY

This is to certify that the undersigned mailed by first-class mail, postage prepaid, or caused to be hand-delivered, a copy of the foregoing *Brief of Appellant* to the following parties:

JAN GRAHAM
ATTORNEY GENERAL
Heber M. Wells Building
160 East 300 South, 6th Floor
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Attorney for Appellee

KENNETH D. SOUZA
Utah State Prison
Draper, Utah

DATED this 12 day of September, 1996.